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MT Ventures Sdn Bhd & Anor v QM Print Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(IM)(NCvC)-936–06 OF 2023
AZIZAH NAWAWI, SUPANG LIAN AND SEE MEE CHUN JJCA
11 JULY 2024

C *Civil Procedure — Appeal — Notice of appeal — Appeal against decision of High Court in dismissing the appellants' application to strike out parts of paragraphs and/or reliefs in respondent's statement of claim — Whether notice of appeal filed by appellants was defective and/or not appealable pursuant to amendment to s 68(1)(f) of Courts of Judicature Act 1964 — Courts of Judicature* D *Act 1964 s 68(1)(f)*

The respondent was a company carrying out its business at a premise in Kuala Lumpur ('Premise No 24'). The respondent was the tenant of the Premise E No 24, which was owned by a foreigner. The first appellant was the registered owner of the premise adjacent to Premise No 24 ('Premise No 22). The second appellant was the tenant at Premise No 22 and used the Premise No 22 for its business. A fire incident occurred at Premise No 22 which spread to Premise No 24 and several nearby premises. The respondent filed a claim against the F appellants for damages and/or losses suffered by the respondent for its business. The respondent also sued on behalf of the owner for losses/damages caused to Premise No 24 due to the fire incident. The appellants had filed a notice of application to strike out parts of the paragraphs and/or reliefs in the statement of claim ('striking out application'). The application was dismissed by the High G Court judge on 10 May 2023 ('the order') and the appellants filed a notice of appeal against the decision. The respondent filed this motion to strike out the appellants' appeal on the ground that the notice of appeal was defective as the order was a non-appealable matter pursuant to the amendment to s 68(1)(f) of the Courts of Judicature Act 1964 ('CJA') on 1 October 2022 pursuant to s 8 H of the CJA (Amendment) Act 2022 ('Amendment Act') and that the effect of the order did not finally dispose of the rights of the parties because the same issues could still be tried and decided after a full trial. The appellants submitted that their rights to appeal was a substantive right of parties that accrued from the commencement of the case, that was when the respondent filed their writ I and statement of claim against the appellants prior to the implementation of the amendment to s 68(1)(f) of the CJA. The appellants relied on the common law Macnaghten test which had been referred to and was accepted by the Federal Court as the general proposition of law in the case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. The issue for determination was whether

pursuant to s 68(1)(f) of the CJA, the notice of appeal filed by the appellants was defective and/or not appealable.

Held, allowing the respondent's motion with costs:

(1) The intention of Parliament in enacting the amendment law was to ensure that the Court of Appeal was not overwhelmed with interlocutory appeals and that only cases with merit would be heard in the Court of Appeal, making the administration of justice more effective and saving time and costs for all parties involved without compromising the fairness and rights of any party. Therefore, Parliament intended that no appeal shall lie against the High Court judge's decision to dismiss an application to strike out any writ or pleading once the Amendment Act took effect. The key aspect of the amended s 68(1)(f) of the CJA was that the decision must be made by the learned judge after the amendment took effect, ensuring that the Court of Appeal was not overwhelmed with interlocutory appeals. As such, Parliament had intended to modify the Macnaghten test and that the cut-off date for the appeals that fell within s 68(1)(f) of the CJA was based on the decision date, not the initiation of proceedings, that was the filing date of the suits. The cut-off point as prescribed by Parliament was when the learned High Court judge made a decision to dismiss the application to strike out the claim. As such, since the decision of the High Court judge was made after the amendment, the said decision was caught by s 68(1)(f) of the CJA. The usage of past tense of the word 'dismissed' in s 68(1)(f) of the CJA was intended to apply to decisions where the High Court judge had dismissed any application to strike out any writ or pleading, whether the writ was filed before or after the amendment to s 68(1)(f) of the CJA took effect. Therefore, whether the writ was filed before or after the amendment was not important, as the crux of the matter was whether the High Court judge had made a decision to dismiss the application after the implementation of s 68(1)(f) of the CJA (see paras 44, 45, 51 & 57).

[Bahasa Malaysia summary

Responden adalah sebuah syarikat yang menjalankan perniagaan di satu premis di Kuala Lumpur ('Premis No 24'). Responden adalah penyewa Premis No 24, yang dimiliki oleh seorang warga asing. Perayu pertama adalah pemilik berdaftar premis yang bersebelahan dengan Premis No 24 ('Premis No 22'). Perayu kedua adalah penyewa di Premis No 22 dan menggunakan Premis No 22 untuk perniagaannya. Satu insiden kebakaran telah berlaku di Premis No 22 yang merebak ke Premis No 24 dan beberapa premis berhampiran. Responden telah mengemukakan tuntutan terhadap perayu untuk ganti rugi dan/atau kerugian yang dialami oleh responden untuk perniagaannya. Responden juga menyaman bagi pihak pemilik untuk kerugian/ganti rugi yang disebabkan kepada Premis No 24 akibat insiden kebakaran. Perayu telah

memfailkan notis permohonan untuk membatalkan sebahagian daripada perenggan dan/atau relief dalam penyataan tuntutan ('permohonan membatalkan'). Permohonan tersebut ditolak oleh hakim Mahkamah Tinggi pada 10 Mei 2023 ('perintah') dan perayu memfailkan notis rayuan terhadap keputusan tersebut. Responden memfailkan usul ini untuk membatalkan rayuan perayu atas alasan bahawa notis rayuan tersebut adalah cacat kerana perintah tersebut adalah perkara yang tidak boleh dirayu menurut pindaan kepada s 68(1)(f) Akta Mahkamah Kehakiman 1964 ('AMK') pada 1 Oktober 2022 berdasarkan s 8 Akta Pindaan Akta Mahkamah Kehakima 2022 ('Akta Pindaan') dan bahawa kesan perintah tersebut tidak melupuskan hak-hak pihak-pihak secara muktamad kerana isu yang sama masih boleh dibicarakan dan diputuskan selepas perbicaraan penuh. Perayu berhujah bahawa hak mereka untuk merayu adalah hak substantif pihak yang timbul daripada permulaan kes, iaitu ketika responden mengemukakan writ dan penyataan tuntutan mereka terhadap perayu sebelum pelaksanaan pindaan kepada s 68(1)(f) AMK. Perayu bergantung kepada undang-undang am ujian Macnaghten yang telah dirujuk dan diterima oleh Mahkamah Persekutuan sebagai proposisi umum undang-undang dalam kes *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1. Isu untuk penentuan adalah sama ada menurut s 68(1)(f) AMK, notis rayuan yang difailkan oleh perayu adalah cacat dan/atau tidak boleh dirayu.

Diputuskan, membenarkan usul responden dengan kos:

(1) Niat Parlimen dalam menggubal undang-undang pindaan adalah untuk memastikan bahawa Mahkamah Rayuan tidak dibebani dengan rayuan interlokutori dan hanya kes-kes yang mempunyai merit akan didengar di Mahkamah Rayuan, menjadikan pentadbiran keadilan lebih berkesan dan menjimatkan masa serta kos untuk semua pihak yang terlibat tanpa mengorbankan keadilan dan hak mana-mana pihak. Oleh itu, Parlimen bermaksud bahawa tidak ada rayuan yang boleh dibuat terhadap keputusan hakim Mahkamah Tinggi untuk menolak permohonan membatalkan sebarang writ atau hujah setelah Akta Pindaan berkuat kuasa. Aspek utama dalam s 68(1)(f) AMK yang dipinda adalah bahawa keputusan mesti dibuat oleh hakim yang bijaksana setelah pindaan berkuat kuasa, memastikan bahawa Mahkamah Rayuan tidak dibebani dengan rayuan interlokutori. Dengan itu, Parlimen berhasrat untuk mengubah ujian Macnaghten dan bahawa tarikh akhir untuk rayuan yang jatuh di bawah s 68(1)(f) AMK adalah berdasarkan tarikh keputusan, bukan permulaan prosiding, iaitu tarikh pemfailan saman. Titik akhir yang ditetapkan oleh Parlimen adalah apabila hakim Mahkamah Tinggi membuat keputusan untuk menolak permohonan membatalkan tuntutan. Oleh itu, oleh kerana keputusan hakim Mahkamah Tinggi dibuat setelah pindaan, keputusan tersebut terikat oleh s 68(1)(f) AMK. Penggunaan kata lampau bagi perkataan 'ditolak'

dalam s 68(1)(f) AMK adalah bertujuan untuk digunakan kepada keputusan di mana hakim Mahkamah Tinggi telah menolak sebarang permohonan untuk membatalkan sebarang writ atau pliding, sama ada writ tersebut difailkan sebelum atau selepas pindaan kepada s 68(1)(f) AMK berkuat kuasa. Oleh itu, sama ada writ itu difailkan sebelum atau selepas pindaan adalah tidak penting, kerana inti pati isu adalah sama ada hakim Mahkamah Tinggi telah membuat keputusan untuk menolak permohonan tersebut setelah pelaksanaan s 68(1)(f) AMK (lihat perenggan 44, 45, 51 & 57).]

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2003] 1 MLJ 1; [2002] 4 CLJ 689, CA (refd)
Chebaro v Chebaro [1986] 2 All ER 897; [1986] Fam 71 (refd)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)
Colonial Sugar Refining Co Ltd v Irving [1905] AC 369, PC (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors [1988] 3 MLJ 82, SC (refd)
Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals [2004] 3 MLJ 17; [2004] 2 CLJ 617, CA (refd)
Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah [2006] 1 MLJ 339; [2004] 4 CLJ 203, FC (folld)

Legislation referred to

Courts of Judicature Act 1964 s 68, 68(1)(f)
Matrimonial and Family Proceedings Act 1984 [UK] s 12
Rules of Court 2012 O 18 r 19(1)(a), (1)(b), (1)(d)
Rules of the Supreme Court 1980 (repealed by Rules of the Federal Court 1995) r 56

Appeal from: Writ No WA-22NCVC-472–08 of 2022 (High Court, Kuala Lumpur)
Editorial Note: At the time of reporting, inquiries with the Court of Appeal have confirmed that there will be no written dissenting judgment.

Justin Voon Tiam Yu (with Melissa Chan Shyuk Wern) (Justin Voon Chooi & Wing) for the appellants.
Ooi Chih Jen (with See Shu Min) (KY Lim & Partners) for the respondent.

Azizah Nawawi JCA (delivering majority judgment of the court):

INTRODUCTION

[1] The motion before this court is an application to strike out the appellant's appeal on the ground that the notice of appeal is defective because the appellant has appealed against the decision given by the High Court dated 10 May 2023 ('said order'), whereby the court had dismissed the appellant's (defendant in the High Court) application to strike out part of the claim in the statement of claim pursuant to O 18 r 19(1)(a) or (b) or (d) of the Rules of Court 2012.

[2] The grounds of the application are that the said order is a matter that cannot be appealed to the Court of Appeal pursuant to the amendment to s 68(1)(f) of the Courts of Judicature Act 1964 ('the CJA 1964') on 1 October 2022 vide s 8 of the Courts of Judicature (Amendment) Act 2022 ('Amending Act') and that the effect of the said order does not finally dispose of the rights of the parties because the same issues can still be tried and decided after a full trial.

[3] The motion was allowed by a majority decision and this judgment constitutes the majority decision.

THE SALIENT FACTS

[4] The respondent is a company carrying out its business at a premise at No 24, Persiaran 118C, Desa Tun Razak Industrial Park, 56000 Cheras, Kuala Lumpur ('the said premise'). The respondent is the tenant of the said premise, which is owned by a foreigner, Pan Mei-Yun (Passport No 200431769).

[5] The first appellant is the registered owner of premise No 22, that is the premise adjacent to the said premise. The second appellant is the tenant at premise No 22 and used the premise No 22 for its business.

[6] A fire incident occurred on 2 July 2021 at premise No 22, which spread to the said premise and several nearby premises.

[7] On 26 August 2022, the respondent filed a claim against the appellants for damages and/or losses suffered by the respondent for its business. The respondent also sued on behalf of the owner for losses/damages caused to the said premise due to the fire incident on 2 July 2021.

[8] On 12 December 2022, the appellants had filed a notice of application

('application') to strike out parts of the paragraphs and/or reliefs in the statement of claim.

[9] The application was dismissed by the learned judge on 10 May 2023. Hence, the appellants filed the notice of appeal dated 8 June 2023 against the said decision.

[10] On 28 July 2023, the respondent filed this motion to strike out the appellant's appeal.

[11] On 19 October 2023, by a majority decision, this court had allowed the respondent's motion with costs.

SUBMISSION OF PARTIES

The respondent's submission

[12] It is the submission of the respondent that the notice of appeal is defective as the said order is a non-appealable matter pursuant to s 68(1)(f) of the CJA 1964. The amendment to s 68(1)(f) of the CJA 1964 took effect on 1 October 2022 whilst the decision of the learned judge to dismiss the respondent's application to strike out parts of the statement of claim was made on 10 May 2023, after the amendment to s 68(1)(f) of the CJA 1964. As such, the respondent submits that the appellant's appeal against the decision dated 10 May 2023 is caught by the new amended s 68(1)(f) of the CJA 1964 and is therefore non-appealable.

[13] The respondent also submitted that the effect of the said order does not finally disposes of the rights of the parties because whatever allegations and/or issues raised by the appellant can still be tried and heard by the High Court during the full trial. Therefore, the same is not a final decision that is appealable.

The appellant's submission

[14] The appellants took the position that the appellants' rights to appeal is a substantive right of parties that accrued from the commencement of the case, that is when the respondent filed their writ and statement of claim against the appellants on/around 26 August 2022, prior to the implementation of the amendment to s 68(1)(f) of the CJA 1964 on 1 October 2022.

[15] It is therefore the submission of the appellant that since the right to appeal is a substantive right, such substantive rights are entrenched and ought not to be procedurally taken away by an amendment which took effect after the

filing of the suit. The appellants relied on the common law Macnaghten test which has been referred to and was accepted by the Federal Court as the general proposition of law in the case of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1.

[16] The Macnaghten test is derived from the case of *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 where it was held that the point of time at which it is to be determined whether a right of appeal exists is, unless there are reasons to conclude to the contrary, the date on which the original action or other proceeding was instituted, and not the date on which the notice of appeal is filed and served. The Lord President in his judgment said at p 372:

> To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

OUR DECISION

[17] Section 68 Non-appealable matters:

> (1) No appeal shall be brought to the Court of Appeal in any of the following cases:
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> ...
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> (f) where a High Court dismissed any application to strike out any writ or pleading; ...

[18] It is common ground that the above provision was included in s 68 of the CJA 1964 pursuant to the s 8 of the CJA (Amendment) Act 2022 dated 1 October 2022. The said provision provides that based on the amendment to s 68, where the High Court made a decision to dismiss any application to strike out the writ or pleading, no appeal shall lie against the said decision to the Court of Appeal.

[19] The only issue before this court is whether pursuant to s 68(1)(f) of the CJA 1964, the notice of appeal filed by the appellant is defective and/or not appealable.

[20] The appellant took the position that the phrase 'any writ or pleading' in s 68(1)(f) of the CJA 1964 does not pertain to any writ or pleading filed before 1 October 2022. As the Amending Act was enacted on 1 October 2022, it can only apply to writs or pleadings filed after that date. Otherwise, the amendment would have a retrospective effect. Therefore, the phrase 'any

application to strike out any writ or pleading' also refers to applications filed in a writ or pleading after 1 October 2022. A

[21] The appellant relied on the common law Macnaghten test which has been applied by the Federal Court in the case of *Lim Phin Khian*. The Macnaghten test provides that a right of appeal vests in a litigant at the time of institution of the original proceedings and not merely as a consequence of an adverse decision against the putative appellant. B

[22] In *Lim Phin Khian*'s case, Gopal Sri Ram, JCA (as he then was) held as follows: C

> In *Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369, there appears the following passage immediately after that quoted by the learned Lord President in his judgment at p 372:
>
> > In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the *well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.* D
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> The opinion of Lord Macnaghten in the *Colonial Sugar Refining Co* case ('the Macnaghten test') has been applied in a number of other Malaysian and Singaporean cases in the context of retrospectivity of criminal statues. See, *Teo Cheng Leong v Public Prosecutor* [1970] 2 MLJ 275; *Phang Chin Hock v Public Prosecuto (No 2)* [1980] 1 MLJ 213; *Public Prosecutor v Hun Peng Khai & Ors* [1984] 2 MLJ 318. E F
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> ...
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> The *Macnaghten test has been read, as I think it should, as establishing the proposition that a right of appeal vests in a litigant at the time of institution of the original proceedings and not merely as a consequence of an adverse decision against the putative appellant.* See, *Hoosein Kasam Dada (India) Ltd v State of Madhya Pradesh* AIR 1953 SC 221; *Garikapati v Subbiah Choudhry* AIR 1957 SC 540*; State of Bombay v Supreme General Films Exchange* AIR 1960 SC 980; *Kasibai v Mahadu AIR* 1964 SC 703; *Jose Da Costa v Bascora Narcornim* AIR 1975 SC 1843. In other words, the point of time at which it is to be determined whether a right of appeal exists is, unless there are reasons to conclude to the contrary, the date on which the original action or other proceeding was instituted, and not the date on which the notice of appeal is filed and served. Any alteration in the law relating to appeals, whether it is an abolition of the rights, or a transfer of the right to another tribunal (in the present case to the Court of Appeal) after institution of original proceedings, is presumed not to be retrospective. (Emphasis added.) G H I

[23] It is therefore the submission of the appellants that based on the Macnaghten test which has been applied by the Federal Court in the case of *Lim Phin Khian*, the amended s 68(1)(f) of the CJA 1964 cannot be used

and/or be given retrospective effect unless there are clear and/or direct statutory provisions that provides that the amending law therefore applies retrospectively against the substantive rights of the appellants herein. There are no such clear provisions on retrospectivity in the Amending Act.

[24] The factual matrix of *Lim Phin Khian*'s case are as follows. The High Court's judgment in this case was delivered on 7 June 1994. According to r 56 of the Rules of the Supreme Court 1980, the appellant had one month to appeal to the Supreme Court (now the Federal Court). The appellant filed and served a notice of appeal on 24 June 1994. On the same day, the Court of Appeal was established through the Courts of Judicature (Amendment) Act 1994, which granted it jurisdiction over appeals from the High Court. When the appeal was heard by the Federal Court on 25 September 1995, the respondent's counsel argued that the Federal Court lacked jurisdiction as the appeal should have gone to the newly formed Court of Appeal. The appellant's counsel countered that the appellant had a vested right to appeal to the Federal Court at the time of the High Court's decision and that the Amending Act of 1994 did not remove this right.

[25] The only issue before the Federal Court then is whether the appeal was competent before the Federal Court, as the appeal should be directed to the Court of Appeal pursuant to the Amendment Act which created the Court of Appeal.

[26] Both Justices Edgar Joseph Junior (FCJ) and Gopal Sri Ram (JCA) referred to the Macnaghten test enunciated in the case of *Colonial Sugar Refining Co Ltd v Irving* for the general proposition that in common law, a right of appeal vests in a litigant at the time of institution of the original proceedings. In other words, the point of time to determine whether a right of appeal accrues is the date on which the original action was instituted, and not the date on which the notice of appeal is filed and served. It follows that any alteration in the law relating to appeals after institution of original proceedings, is presumed not to be retrospective.

[27] However, both judges did not apply the Macnaghten test in the factual matrix of the case.

Decision of Justices Edgar Joseph Junior FCJ

[28] Justices Edgar Joseph Junior looked at the effect of s 17 of the Amending Act 1995, which reads:

> Any proceeding which is pending before the Supreme Court on the 23rd June 1994 shall be continued or proceeded with, as the case may be, before the Federal Court

and for this purpose the Federal Court shall have and exercise all the powers of the Supreme Court prior to the 24th June 1994. A

[29] Justice Edgar Joseph Junior held that s 17, which is deemed that effective from 24 June 1994, any proceeding pending before the Supreme Court as of 23 June 1994, shall continue before the Federal Court. The term 'any proceeding' in s 17 includes 'appeal,' referring to an appeal from the judgment, order, or decision of the High Court. B

[30] Justice Edgar Joseph Junior then held that the effect of s 17 of the Amending Act 1995 appears to be that the crucial date for determining whether the Court of Appeal or the Federal Court has jurisdiction to hear a particular appeal from the judgments, orders, or decisions of the High Court is 23 June 1994. If, on that date, an appeal is already pending in the Supreme Court (now the Federal Court), then the Federal Court shall have jurisdiction to hear the appeal. Since the appeal in the said appeal was filed in the Federal Court on 23 June 1994, therefore jurisdiction lies with the Federal Court. C D

[31] Added to that, Justice Edgar Joseph Junior also held that since an appeal challenges the correctness of a lower court's decision before an appellate court, it can be argued that Parliament intended s 17 to mean that the right of appeal arises only when a judgment, order, or decision is given. Interpreting s 17 purposively, it is evident that Parliament had intended for the Federal Court, not the Court of Appeal, to have jurisdiction over any appeal against a High Court judgment, order, or decision given on or before 23 June 23 1994, regardless of whether the appeal was brought before or after that date. E F

> What then is the true effect of s 17 in the context of the issue which arises for decision?
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> *Now, in principle, it is the correctness of the judgment, order or decision, which is challenged on appeal.* It can, therefore, be plausibly argued that since an appeal is a proceeding by which the correctness of the decision of the court below is under challenge before the appellate court, Parliament intended by the enactment of s 17 that the right of appeal should arise, by its very nature, only when a judgment, order or decision by which a litigant is aggrieved is given. G H
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> *Accordingly, applying a purposive interpretation to s 17, it is my view that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been brought whether on or before or even after such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same.* (see pp 18–19) (Emphasis added.) I

Decision of Justice Gopal Sri Ram JCA

[32] Justice Gopal Sri Ram did not look at the effect of s 17 of the Amending Act 1994. Justice Gopal Sri Ram looked at the intention of Parliament in enacting the specific statute. In the said appeal, Justice Gopal Sri Ram held that a court's task is to examine the specific statute in question and determine Parliament's intent. In the case before the court, the issue to be resolved is whether the initial presumption against retroactivity has been overridden by a contrary intention of Parliament. Therefore, the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective. His Lordship said this at p 24:

> Thus, in any given case, the task to be undertaken by a court is to examine the particular statute that has fallen for interpretation and to ascertain what Parliament intended. In the context of the present case, the question that falls for determination is whether the prima facie presumption against retrospectivity has been displaced by contrary Parliamentary intention, and if so, to what extent.

[33] Justice Gopal Sri Ram held that when applying the Macnaghten test to this case, it would appear that under the 1994 Amending Act, appeals for suits initiated in a High Court before 24 June 1994 would bypass the Court of Appeal and go directly to the higher court. This would result in the orders made by the Court of Appeal since its inception could be deemed invalid for lacking jurisdiction. At p 25, His Lordship added:

> The Amending Act of 1994 does not, however, contain any provision in respect of suits pending before the High Courts as at the date of the amendment. *There is, therefore, no express provision in the Amending Act of 1994 displacing the Macnaghten test. Whether it has been displaced by necessary implication is a matter I shall touch upon later.*
>
> In the light of the foregoing, *if the Macnaghten test is applied to the present case*, in the absence of a contrary intention — and as I have said I find no contrary intention expressly stated in the Amending Act of 1994 — *it would mean in that in respect of all suits and other proceedings which had been instituted in a High Court before 24 June 1994, appeals would lie directly to this court and not to the Court of Appeal. The result would be that all orders made upon applications and appeals in respect of matters heard and disposed of by the Court of Appeal since its establishment were made without jurisdiction, and are therefore nullities. If that is the true consequence intended by Parliament, then I must, despite the horrendous consequences that would follow, adhere to its will and hold accordingly.*
>
> Now, there is a presumption of great antiquity which operates in the sphere of statutory interpretation. It is an irrebuttable presumption. It is that Parliament is presumed to know all the relevant law upon the particular subject upon which it legislates. In the context of the present dispute, Parliament is presumed to have known the nature and content of the Macnaghten test. (Emphasis added.)

[34] Therefore, Justice Gopal Sri Ram then held it is more appropriate to consider the legislative substance and purpose, in order to ascertain Parliament's true intent. It seems implausible that Parliament would have

intended to render the Court of Appeal effectively redundant after endowing it with full appellate powers. Such a conclusion would suggest that Parliament's efforts in establishing the Court of Appeal were futile, which His Lordship find difficult to accept. His Lordship held at p 26:

> In my judgment, *the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective aim or purpose.* And when I do that, I am much moved to the conclusion that Parliament could not have intended those horrendous consequences of which I spoke a moment ago. *To hold otherwise would mean that Parliament went through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction theretofore enjoyed by the Supreme Court, only to leave it bereft of any business. It would mean that Parliament was legislating in vain.* With respect, I do not think that it is open for me to reach such a conclusion. (Emphasis added.)

[35] Having ascertained Parliament's intention, Justice Gopal Sri Ram held that Parliament had intended to modify the Macnaghten test, and that the cut-off date for the Federal Court's appellate jurisdiction over High Court cases is based on the decision date, not the initiation of proceedings. Therefore, all appeals for all High Court decisions pronounced before 24 June 1994, fall under the Federal Court's jurisdiction, while appeals for decisions made on or after that date fall under the Court of Appeal's jurisdiction. At p 26 His Lordship concluded as follows:

> When viewed from the standpoint that I have adopted, *it is clear that Parliament intended to displace the Macnaghten test to this extent; that the cut-off date with regard to the appellate jurisdiction of this court in respect of cases decided by a High Court is the date of the decision and not the date of the institution of the proceedings.* In arriving at my conclusions upon this matter, I have not overlooked the provisions of s 17 of the Courts of Judicature (Amendment) Act 1995 ('the 1995 Act'). But I have reached my decision despite the terms of that section ... (Emphasis added.)

[36] Justice Gopal Sri Ram made the following conclusion at p 27:

> It follows from what I have thus far said, that in respect of all causes and matters pending before a High Court, *appeals against decisions pronounced before 24 June 1994, lie to this court which has jurisdiction to entertain them. However, in respect of all decisions pronounced on or after that date, appeals lie to the Court of Appeal which is seized with jurisdiction to entertain them.*
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> In the present appeal, the decision by the High Court was delivered before the Amending Act of 1994 came into force. It is a case to which the Amending Act of 1994 has no application. (Emphasis added.)

[37] Therefore, whether we apply the reasoning of Justice Edgar Joseph Junior or Justice Gopal Sri Ram, the conclusion remains the same, that by ascertaining Parliament's intention and the purpose of the Amending Act, Parliament had intended to replace the Macnaghten test to the extent that the

relevant date for the appellate jurisdiction of Federal Court concerning cases decided by a High Court is the date of the decision, not the date the proceedings were initiated.

Applying the decision in Lim Phin Khian

[38] Applying the principle set out by the Federal Court in *Lim Phin Khian* to our present appeal, the issue then is whether Parliament had intended to displace the Macnaghten test via the amended s 68(1)(f) of the CJA 1964.

[39] In *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1; [2002] 4 CLJ 689, Gopal Sri Ram JCA said the following:

> In our judgment the approach to interpretation of the Act should be purposive. Indeed Mr Wong readily conceded in the argument before us yesterday that the purpose of the Act is to protect the public from incompetent members of the legal profession. Once it is accepted that the Act is there to protect the public, then we cannot in the present case accede to the invitation to apply a literal interpretation to s 13(1) because that would defeat the intention of Parliament.
>
> Additionally, we observe that the modern approach to statutory interpretation is purposive not literal. Indeed the abandonment of the literal approach these days is evidenced by the speech of Lord Griffiths in *Pepper v Hart* [1993] 1 All ER 42. This is what His Lordship said at p 50 of the report:
>
> > The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.
>
> Although the learned judge did not say so in so many words, he did in fact apply a purposive construction to the language of s 13(1). He therefore adopted the correct approach and, as we have earlier said, we are in agreement with him on his conclusion.

[40] In order to ascertain the intention of Parliament in enacting the amended s 68(1)(f) of the CJA, this court can refer to the Hansard in interpreting the said provision. We refer to the Federal Court decision of *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 where Edgar Joseph Jr FCJ held as follows:

> Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to absurdity.

[41] The Hansard dated 22 July 2022 on the amendment reads as follows:

Komitmen badan kehakiman ialah untuk melakukan reformasi substantif dalam mekanisme kehakiman bagi memperkenalkan kaedah untuk meningkatkan kecekapan dan juga produktiviti berkaitan beban tugas kehakiman. Ucapan Yang Amat Arif, Ketua Hakim Negara, semasa Majlis Pembukaan Tahun Perundangan 2020, telah pun menyatakan, dengan izin, *'The Judiciary has to constantly introduce measures to meet the constantly evolving problems arising in terms of the workload of the Judiciary. A perennial problem is the increasing case load. The ever-increasing interlocutory appeals affect the Court of Appeal the most. In fact, the Court of Appeal has become so inundated with interlocutory appeals, which currently stand at around 1,200 appeals that the Judiciary needed to co-opt special Court of Appeal panels comprising Federal Court judges to reduce the heavy workload in the Court of Appeal'.*

Kaedah perubahan substantif yang dicadangkan ialah dengan mengehadkan rayuan dari Mahkamah Rendah ke Mahkamah Tinggi dan dari Mahkamah Tinggi ke Mahkamah Rayuan dengan mengehadkan rayuan dalam kes-kes permohonan interlokutori yang tidak memprejudiskan hak pihak-pihak.

Bagi maksud ini, kes interlokutori sivil yang dicadangkan untuk dihadkan rayuannya adalah seperti berikut:

(i) permohonan penghakiman terus yang ditolak oleh mahkamah;

(ii) permohonan untuk membatalkan apa-apa writ ataupun pleading yang ditolak oleh mahkamah; dan

(iii) permohonan untuk mengetepikan satu penghakiman ingkar yang dibenarkan oleh mahkamah.

...

Mesyuarat Jawatankuasa Kaedah-kaedah antara lainnya, pada tahun 2019 dan tahun 2020 bersetuju supaya Akta 91 ini dipinda bagi memperuntukkan mengenai had untuk merayu bagi kes-kes interlokutori sivil seperti yang dinyatakan di atas dan Cadangan itu tidaklah akan melupuskan hak pihak-pihak yang merayu dan didengar.

Hal ini *kerana pihak masih lagi mempunyai ruang untuk menghujahkan kes dalam perbicaraan penuh dan mahkamah akan memberikan penghakiman bagi berdasarkan merit sesuatu kes dengan asas ataupun fundamentals iaitu akses kepada keadilan masih kekal dan tidak terjejas.*

Di samping itu, pindaan ini juga merupakan dihasratkan supaya judicial time dapat dimanfaatkan dengan sebaik-baiknya iaitu dengan memfokuskan kepada perkara-perkara yang lebih substantif, sebagai contoh penulisan alasan penghakiman.

Oleh yang demikian adalah high time, dengan izin, cadangan pindaan ini direalisasikan dengan meminda Akta 91, bagi mengehadkan rayuan bagi kes-kes interlokutori sivil daripada Mahkamah Rendah kepada Mahkamah Tinggi dan daripada Mahkamah Tinggi kepada Mahkamah Rayuan.

Kesan kepada pindaan ini akan memperlihatkan, hanya kes yang mempunyai merit sahaja yang akan didengarkan di Mahkamah Rayuan, dan menjadikan pentadbiran kehakiman lebih efektif dan masa serta kos pihak-pihak yang terlibat kini dapat

dijimatkan tanpa menjejaskan keadilan dan hak mana-mana pihak.(Emphasis added.)

[42] The purpose of the amending law can clearly be discerned from the Hansard's reference to the speech by YAA the Honourable Chief Justice at the Opening Ceremony of the Legal Year 2020, which reads:

> The Judiciary has to constantly introduce measures to meet the constantly evolving problems arising in terms of the workload of the Judiciary. A perennial problem is the increasing case load. The ever-increasing interlocutory appeals affect the Court of Appeal the most. In fact, the Court of Appeal has become so inundated with interlocutory appeals, which currently stand at around 1,200 appeals that the Judiciary needed to co-opt special Court of Appeal panels comprising Federal Court judges to reduce the heavy workload in the Court of Appeal.

[43] Therefore the Amending Act, which was to provide for limits on appeals for interlocutory civil cases does not eliminate the rights of parties to appeal and be heard. The parties will still be heard on the substantive case.

[44] As can be ascertained from the Hansard, the intention of Parliament in enacting the amendment law is to ensure that the Court of Appeal is not overwhelmed with interlocutory appeals and that only cases with merit will be heard in the Court of Appeal, making the administration of justice more effective and saving time and costs for all parties involved without compromising the fairness and rights of any party. The rights of parties are maintained in the trial itself.

[45] It is therefore evident that Parliament intended that no appeal shall lie against the High Court judge's decision to dismiss an application to strike out any writ or pleading once the Amendment Act takes effect. The key aspect of the amended s 68(1)(f) is that the decision must be made by the learned judge after the amendment takes effect, ensuring that the Court of Appeal is not overwhelmed with interlocutory appeals. As such, we are of the considered opinion that Parliament had intended to modify the Macnaghten test, and that the cut-off date for the appeals that falls within s 68(1)(f) of the CJA 1964 is based on the decision date, not the initiation of proceedings, that is the filing date of the suits.

The Westcourt Corp case

[46] The case of *Lim Phin Khian* was also referred to by the Federal Court in the case of *Westcourt Corp Sdn Bhd lwn Tribunal Tuntutan Pembeli Rumah* [2006] 1 MLJ 339; [2004] 4 CLJ 203, where the Federal Court had also ascertained the intention of Parliament and applied the purposive interpretation in statutory interpretation.

[47] In *Westcourt Corp*'s case, the appeal was against a decision of the High Court in quashing the award made by the Housing Tribunal ('Tribunal') in favour of the homebuyers. The High Court had ruled that the awards were invalid, null and void because the Tribunal has no jurisdiction to hear claims for late delivery damages. This decision was based on the fact that the sale and purchase agreements ('SPAs') were signed before 1 December 2002, when the Housing Developers (Control And Licensing) (Amendment) Act 2002 ('Amending Act') took effect. The High Court held that the Amending Act could not be applied retrospectively as it affects substantive rights of parties. In the absence of any express provision to the contrary, the High Court held that the Amending Act has no retrospective effect and do not apply to SPAs signed before the Amending Act took effect. The decision of the High Court was reversed by the Court of Appeal in *Tribunal Tuntutan Pembeli Rumah v Westcourt Corp Sdn Bhd and other appeals* [2004] 3 MLJ 17; [2004] 2 CLJ 617.

[48] In *Westcourt Corp*'s case, the issue before the Federal Court is whether the Tribunal has any jurisdiction to hear and determine the homebuyers' claims for liquidated damages in respect of SPAs entered before the Amendment Act took effect. The question before the Federal Court reads:

> Whether the Tribunal has jurisdiction to hear and adjudicate on cases where the sale and purchase agreement was entered into before 1 December 2002 and, if so to what extent.

[49] The Federal Court looked at s 16N in order to give it a purposive interpretation and looked at the intention of Parliament in enacting the Amendment Act:

> Peruntukan-peruntukan di atas menunjukkan bahawa bidang kuasa tribunal ditetapkan secara longgar. Ini pada pendapat mahkamah, menunjukkan Hasrat Parlimen untuk menyediakan suatu forum yang mudah bagi pembeli-pembeli rumah membuat tuntutan. Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa:
>
> > It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into prior to the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal.

[50] The Federal Court then held that the date of the sale and purchase agreement entered into between a homebuyer and a developer is not material in

A determining the jurisdiction of the tribunal to adjudicate a claim lodged by the homebuyer. The Federal Court held that the provision in the Act does not stipulate a jurisdictional cut-off point by reference to the date of the sale and purchase agreement entered into between the homebuyer and the developer in order to ascertain the jurisdiction of the Tribunal. The only jurisdictional B limitations imposed under s 16N(2) are that the claim must be based on the sale and purchase agreement with a licensed housing developer and brought within twelve months from the issuance of the certificate of fitness for occupation or the expiry of the defects liability period. No other limitations are specified. Therefore, it is clear that Parliament did not intend for the tribunal to C lack jurisdiction over claims from agreements made before a certain date.

[51] Applying the *Westcourt* case, we are of the considered opinion that the cut-off point as prescribed by Parliament is when the learned High Court judge made a decision to dismiss the application to strike out the claim. As such, we D are of the considered opinion that since the decision of the High Court judge was made after the amendment, the said decision is caught by s 68(1)(f) of the CJA 1964.

Chebaro v Chebaro

E

[52] The Federal Court in *Westcourt*'s case also referred to the case of *Chebaro v Chebaro* [1986] 2 All ER 897; [1986] Fam 71. In *Chebaro*'s case, the facts are that the parties were married in Beirut, Lebanon, and settled in the United Kingdom. They were later separated but continued to live in England. On F 16 April, 1985, at the husband's request, a decree of divorce was granted in Lebanon. After s 12 of the 'Matrimonial and Family Proceedings Act 1984' came into force in England on 16 September 1985, the wife applied for permission to obtain a financial relief order. Section 12 of the Act reads:

G Where — (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and (b) the divorce, annulment or legal separation is entitled to be recognized as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

H

[53] The wife's application was allowed Sheldon J, who held as follows:

Apart from his reliance in the present case on the general proposition that legislation is not to be regarded as having retrospective operation unless such a construction is I unavoidable, counsel for the husband has pointed to the unfair consequences to the husband that might follow in such an event; the creation of new rights and obligations and by the imposition on him of potentially severe financial liability which did not exist when his marriage was dissolved. The possibility of such disadvantages, of course, I accept; indeed, the risk that such consequences will follow forms the basis of the court's dislike of retrospective legislation. *That is not to*

say, however, that such risks are not contemplated or even intended by Parliament when introducing new legislation.

...

In my judgment ... *those words, in their ordinary and natural meaning, apply initially to all cases in which the divorce, annulment or legal separation has been pronounced in judicial or other proceedings overseas, whatever the date of such proceedings and even if it was before 16 September 1985*, and accordingly, the provisions in question are retrospective in their effect.

[54] On the husband's appeal to the Court of Appeal, Balcombe LJ in *Chebaro v Chebaro* [1986] 2 All ER 897; [1986] Fam 71 said at p 131:

... *in my judgment the meaning of the words used is plain and unequivocal. The use of the past tense — 'Where ... a marriage has been dissolved' — in contradistinction to the present tense in the following paragraph* — and ... the divorce ... is entitled to be recognized' — *makes it clear that the section is intended to apply to a decree of divorce, whenever pronounced and whether before or after 16 September 1985* ... Further support for this construction is afforded by the provisions of paragraphs (a) and (b) of section 15(1) of the Act of 1984. These lay down the jurisdictional requirements which have to be satisfied for the court to entertain an application for financial relief under Part III ... (Emphasis added.)

[55] Neill LJ held at p 134:

In my judgment the *intention of the legislature can be determined with sufficient certainty by looking at the words of section 12(1) of the Act of 1984 by themselves.* It is plain from the concluding words of the subsection that a person can apply to the court for financial relief if the conditions set out in paragraphs (a) and (b) are satisfied. It is also to be observed that this right can be exercised by either party to the marriage. (Emphasis added.)

[56] The Federal Court in *Westcourt Corp*'s case states that what is clear from the above judgment is that the court takes the approach based on the usual meaning and effect of s 12, the question of whether a marriage was dissolved before or after the section came into force is not important. What is important is that the conditions stated in the section are fulfilled. At p 215, the Federal Court states that:

Jelas daripada ungkapan-ungkapan penghakiman di atas, mahkamah itu mengambil pendekatan bahawa mengikut maksud dan kesan biasa s 12 itu, soal sama ada sesuatu perkahwinan itu dibubarkan sebelum atau selepas seksyen itu berkuatkuasa tidak penting. Apa yang penting ialah syarat-syarat yang dinyatakan di dalam seksyen itu dipenuhi.

[57] Applying the above principle that was approved by our Federal Court in *Westcourt Corp*'s case and giving s 68(1)(f) of the CJA 1964 its plain and obvious meaning would mean that usage of past tense of the word '*dismissed*' in

A the said provision is intended to apply to decisions where the High Court judge had dismissed any application to strike out any writ or pleading, whether the writ was filed before or after the amendment to s 68(1)(f) of the CJA takes effect. Therefore, whether the writ was filed before or after the amendment is not important, as the crux of the matter is whether the High Court judge has
B made a decision to dismiss the application after the implementation of s 68(1)(f) of the CJA 1964.

[58] In *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p 84, Hashim Yeop A Sani SCJ speaking for
C the Supreme Court said:

> ... it is trite law that where the words of a statute are clear there is no room for the court to go beyond the expressed language of the statute.

D CONCLUSION

[59] In the present case, the purpose of the amendment is to reduce the appeals from clogging the appeal courts in matters where the cases can proceed to full trial. In such a situation, the substantive rights of parties to a full trial
E have not been taken away.

[60] The new s 68(1)(f) of the CJA 1964 is clear, that the use of the term 'dismissed' is intended to cover decisions where the High Court judge has rejected any application to strike out a writ or pleading, regardless of whether
F the writ was filed before or after the amendment to s 68(1)(f) of the CJA 1964 became effective.

[61] For the reasons enumerated above, we are of the considered opinion that there is merit in the respondent's motion and the same is allowed by this
G court.

[62] Justice See Mee Chun had the occasion to look at these grounds and has agreed to the same to be the majority decision.

H *Respondent's motion allowed with costs.*

Reported by Nabilah Syahida Abdullah Salleh

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